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IN THE

Supreme Court of the United States

OCTOBER TERM, 1996

IN RE APPEAL OF RONALD AND ANISSA COULTER, et al
AND THOMAS ROSTEK, et al

Plaintiffs-Petitioners,

IN RE APPEAL OF DOUGLAS SMITH,

Plaintiff-Petitioners,

IN RE APPEAL OF JOSEPH AND DONNA CORRIERE,

Plaintiffs-Petitioners,

--v.--

METROPOLITAN LIFE INSURANCE COMPANY,

Defendant-Respondent,

ON PETITION FOR WRIT OF CERTIORARI
TO THE UNITED STATES COURT OF APPEALS
FOR THE THIRD CIRCUIT

SUPPLEMENTAL BRIEF OF PETITIONERS

DANIEL W. CANNON
637 East Capitol Street, S.E.
Washington, D.C. 2003-4303
(202) 543-7664

KENNETH W. BEHREND
Behrend and Ernsberger
2400 Grant Building
Pittsburgh, PA 15219
(412) 391-2515

Attorneys for Petitioners

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INTRODUCTION

The petition for a writ of certiorari was placed on the

docket on June 13, 1997. On June 25, 1997, this Court rendered its decision in **Amchem Products Inc. v Windsor**, No. 96-270, 1997 U.S. LEXIS 4032.

This Court's opinion in the **Amchem Products** case has fully illuminated the facts that petitioners, along with countless thousands perhaps millions of other putative plaintiff class members have erroneously been adversely affected by Federal courts' approvals of settlements of class action proceedings.

These putative plaintiff class members have been adversely affected by being lumped into settlement classes or subclasses in which they did not belong. As a result, they have been held bound by settlements negotiated without their participation or adequate representation on terms which did not adequately, if at all, compensate them for their particular claims which had been bargained away by persons not privy to them.

The **Amchem Products** decision greatly clarified the responsibilities of Federal courts in adjudicating settlements of Federal class action lawsuits. Review of the instant cases is compellingly needed to clarify the rights of absentees following

such settlements. Do absentees have a constitutional due process right to make a collateral attack in the forum of their choice on the inadequacy of their representation and their wrongful inclusion in the settlement class? Petitioners' views on this issue will be found in their petition for a writ of certiorari and their reply brief.

The purpose of this supplemental brief is to demonstrate how the class action settlement judge in the case of **Horton v Metropolitan Life Insurance Company**, No. 93-1849-CIV-T-23A (M.D. Fla. Oct. 25, 1994) (to whom the instant cases have been erroneously transferred), violated Federal Rule of Civil Procedure 23; the Rules of Decision Act, 28 U.S.C. §1652; the Rules Enabling Act, 28 U.S.C. §2072; and the Fifth Amendment of the United States Constitution; in the light of this Court's decision in the **Amchem Products** case.

IMPACT OF THE AMCHEM PRODUCTS DECISION ON THESE CASES

This Court's decision in the case of **Amchem Products Inc., v Windsor**, 1997 WL 345149 (U.S.), 96-270, at pages 25-26,

emphasizes the design of Federal Rule of Civil Procedure 23 to protect absentees from unwarranted or overbroad class definitions:

> ... other specifications of the rule - those designed to protect absentees by blocking unwarranted or overbroad class definitions -demand undiluted, even heightened attention in the settlement context. ... Such attention is of vital importance, for a court asked to certify a settlement class will lack the opportunity present when a class is litigated, to adjust the class, informed by the proceedings as they unfold. ...

In footnote 16 on page 17, this Court stated in part that:

> For reasons the Third Circuit aired, see 83 F.3d 610, 626-635 (1996), proposed settlement classes sometimes warrant more not less caution on the question of certification.

In stark contrast, the class action settlement judge in the Horton case stated in Findings of Fact and Conclusions of Law Regarding Motions to Intervene, etc., October 25, 1994 in paragraph 47:

> These contentions ignore that the parties have presented the Court with a settlement and that Rule 23's requirements 'may be more easily satisfied in the settlement context than in the more complex litigation context. ...' (Underlining is the class action settlement judge's.)

Surely, a class action settlement judge in Tampa, Florida,

whose concept of proper class action procedure is so wrong, cannot be a more appropriate forum than a forum in Pennsylvania, the state where the illegal marketing of insurance policies occurred.

The reasons aired by the Third Circuit included:

> ... [B]ecause we must apply an individualized choice of law analysis to each plaintiff's claim, see **Phillips Petroleum Co., v Shutts**, 472 U.S. 797, 823, 105 S.Ct. 2985, 2990, 86 L.Ed.2d 628 (1985)(constitutional limitations on choice of law apply in nationwide class actions) ... . [The Tampa court was totally unaware of this.] **Georgine**, 83 F.3d at 627.

The Tampa Court, however, completely ignored this compelling reason for heightened scrutiny after certifying a class for settlement purposes only. In particular, in his Findings of Fact and Conclusions of Law Regarding Motions to Intervene, etc., of October 25, 1994, he stated in Paragraph 53:

> The only issue before the Court is the fairness and adequacy of the settlement ... an issue controlled by federal law concerning settlement class certification and settlement approval. The Court therefore does not need to resolve the constitutional limits on the application of state choice-of-law principles.

Thus, the class action settlement judge has boasted that he

has sidestepped the application of the laws of any state. He was unaware that "constitutional limitations on choice of law apply in nationwide class actions ... ."

This reaffirms the conclusion that transfer of lawsuits based on violations of Pennsylvania law to this Florida judge is improper, prejudicial, and violative of due process.

In the same document in which the class action settlement judge boasted of not applying any state law, the class action settlement judge ruled in Paragraph 19 that the Coulters were members of the **Horton** settlement class, without applying any state law and presumably relying on Federal Rule of Civil Procedure 23. The issue of the Coulters' membership in the **Horton** settlement class is one of substantive rights and is not procedural in nature. Thus, the class action settlement judge violated the Rules Enabling Act, 28 U.S.C. §2072, which provides that "Such rules shall not abridge, enlarge or modify any substantive right ... ." The class action settlement judge also violated the Rules of Decision Act, 28 U.S.C. §1652, which provides that:

> The laws of the several states except where the Constitution or treaties of the United States or Acts of Congress otherwise require or provide, shall be regarded as rules of decision in civil actions in the courts of the United States, in cases where they apply. ...

Another Third Circuit point favorably referred to by this Court was:

> A series of statewide or more narrowly defined adjudications, either through consolidation under Rule 42 (a) or as class actions under Rule 23, would seem preferable. Georgine, 83 F.3d at 634.

Petitioners vigorously pressed upon the class action settlement judge that their Pennsylvania claims should be adjudicated on a statewide basis either through severance or creation of a subclass. However, the class action settlement judge refused to entertain the thought.

This Court's own analysis is set forth at pages 17 and 18 of Amchem Products, as follows:

> ... First, the standards set for the protection of absent class members serve to inhibit appraisals of the chancellor's foot kind - classifications dependent upon the court's gestalt judgment or on the overarching impression of the settlement's fairness.

> Second, if a fairness inquiry under Rule 23(e) controlled certification, eclipsing Rule 23(a) and (b), and permitting class designation despite the impossibility of litigation, both class counsel and court would be disarmed. ...
>
> Federal courts in any case lack authority to substitute for Rule 23's certification criteria a standard never adopted that if a settlement is fair then certification is proper. ...

The class action settlement judge brushed aside petitioners' quest for the application of Pennsylvania law to their claims, stating that the court had avoided choice of state law problems by following Rule 23, which the class action settlement judge referred to as "Federal law."

This Court, in the **Amchem Products** decision, emphasized the importance of various state laws in class action proceedings at page 19:

> Differences in state law, the court of appeals observed compounded these disparities. See **id** at 627 (citing **Phillips Petroleum Co. v Shutts**, 472 U.S. 797, 828, 105 S.Ct. 2985, 86 L.Ed. 628 (1985).

This issue is of heightened importance in insurance business cases, as to which the Congress has specifically mandated

application of state laws.

The class action settlement judge refused to entertain petitioners' alternative quest to be placed in a subclass, leaving the impression that this approach was meritless. This Court, in the **Amchem Products** case, favorably quoted comments on the subclass concept, at page 21:

> [W]here differences among members of a class are such that subclasses must be established, we know of no authority that permits a court to approve a settlement without creating subclasses on the basis of consents by members of a unitary class, some of whom happen to be members of the distinct subgroups. The class representatives may well have thought that the settlement serves the aggregate interest of the entire class. But, the diversity among subgroups requires that the members of each subgroup cannot be bound to a settlement except by consents given by those who understand that their role is to represent solely the members of their respective subgroup.

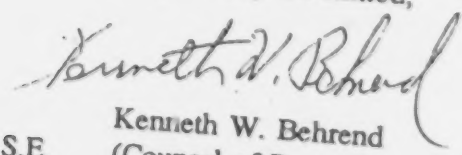
The class action settlement judge in the **Horton** case demonstrated a completely closed mind toward subclasses, which should further disqualify him from consideration as a preferable alternative forum for hearing cases arising in Pennsylvania.

CONCLUSION

This Court's decision in the **Amchem Products** case has totally exploded the ostensible legal foundations of the **Horton** case judgment, particularly the inclusion of the petitioners in the settlement class. It has also demonstrated that transfer of the instant cases to the class action settlement judge in the **Horton** case was inappropriate.

The instant cases should be remanded to the United States District Court for the Western District of Pennsylvania with instructions to proceed with consideration of the petitioners' complaints.

Respectfully submitted,



Daniel W. Cannon
637 East Capitol Street S.E.
Washington, D.C. 20003-4303
(202) 543-7664

Kenneth W. Behrend
(Counsel of Record)
BEHREND AND ERNSBERGER
2400 Grant Building
Pittsburgh, PA 15219
(412) 391-2515
Attorneys for Petitioners

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